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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Petitioners,

vs.

GILBERT STAMM, et al.,
Respondents.

BRIEF OF RESPONDENT-INTERVENORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This brief is filed on behalf of the following parties who appeared as defendant-intervenors during the proceedings before the District Court and as responding parties defendant on appeal to the United States Court of Appeals for the Ninth Circuit: The County of Calaveras, San Joaquin County Flood Control and Water Conservation District, County of Stanislaus, County of Tuolumne, City of Escalon, City of Riverbank, City of Modesto, City of Oakdale, City of

Ripon, City of Stockton, Salida Sanitary District, Reclamation District 2075, San Joaquin River Water Users Company, Federal Land Bank Association of Modesto, Federal Land Bank Association of Stockton, Stanislaus River Flood Control Association, Del Rio Golf and Country Club, Gerald Barton, Mae Giovanetti, John Hertle, Manuel Macedo, Paul A. Philbin, Raymond Arroquy, Donald R. Fairchild, William Jiminez, Mountain Counties Water Resources Association, State Building and Construction Trades Council of California, and California State Conference of Operating Engineers. The foregoing parties are hereinafter referred to, for convenience, as Respondent-Intervenors.

This action arises under the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. 1431 et seq. (hereinafter referred to as NEPA), which requires the filing of an Environmental Impact Statement (EIS) in connection with any proposed major federal action which will affect the quality of the human environment. The action concerns the proposed New Melones Dam on the Stanislaus River.

The Stanislaus River has a record history of destructive flooding dating back to March, 1907. Since January, 1963, there have been four major floods on the river which, according to estimates of the Corps of Engineers (hereinafter referred to as "Corps"), have resulted in over Six Million ($6,000,000.00) Dollars in damage to property along the river above its mouth, based on 1971 prices. These estimates indicate that the flood of January, 1969, alone would

have resulted in nearly Two and One-Half Million ($2,500,000.00) Dollars in damages, at 1971 prices, above the confluence of the Stanislaus and San Joaquin Rivers. In view of property improvements and increased property values occurring since these floods, recurrence of the same floods today would result in substantially increased damages. Flood flows of the Stanislaus River also cause substantial damage along the San Joaquin River and in the Sacramento-San Joaquin Delta. Estimates by the Corps indicate that damages occurring below the junction of the Stanislaus River with the San Joaquin River which are directly attributable to waters of the Stanislaus River average approximately one and one-half times the damages along the Stanislaus River above its mouth. Thus, based on these estimates and allowing for damage in the Delta and escalation of property values, recurrence of the 1963-1969 floods in the future would produce total damages of over Fifteen Million ($15,000,000.00) Dollars at 1971 prices.

The original New Melones Project was authorized as a flood control project in 1944, Flood Control Act of 1944, 58 Stat. 887. Since that time, as was demonstrated at the trial of this action, substantial demands have developed in the basin for increased flood control, irrigation, fish and wildlife enhancement, power generation, and water quality control. Thus, in 1962 Congress re-authorized a substantially enlarged project which is essentially the present project at the New Melones site, Flood Control Act of 1962, 76 Stat. 1173.

There are presently four major existing dams on the Stanislaus River (Beardsley, Goodwin, existing Melones, and Tulloch) as well as several small reservoirs and a number of Pacific Gas and Electric Company diversion tunnels and power houses. The existing white water reaches of the Stanislaus, which will admittedly be inundated if New Melones Dam is constructed and operated as planned, result in substantial part from releases of stored water from the existing man-made structures on the river.

The planned New Melones Dam is a multi-purpose public works project. In addition to irrigation water, the project will provide flows for fish and wildlife, water quality control, and the generation of hydroelectric power; will provide recreational benefits; and, most importantly, will provide flood control for the residents of the river basin who have suffered repeated losses due to flooding. To bring the project to a halt now will result in the loss, or significant delay in the providing of all of these benefits to the residents of the basin and of the State of California, in general. Respondent-Intervenors are filing this brief in opposition to the granting of a writ of certiorari so that the interests of those who will be most directly affected by the decision may be heard.

Petitioners Environmental Defense Fund (EDF) and Sierra Club (hereinafter collectively referred to as "Petitioners") originally brought suit on June 8, 1972, seeking preliminarily to enjoin further work on the dam on the ground that the EIS filed in connection with the project was inadequate in that it (1) failed

to describe the environmental effects of the use of the new irrigation water to be stored by the dam; (2) failed to describe the whole project because of its failure to discuss a proposed but unauthorized project of which New Melones may become a part; and (3) failed to discuss a variety of alternatives to the proposed structure. The motion for a preliminary injunction and the trial on the merits were consolidated, and the case was then tried on September 27-30 and October 9, 1972.

The District Court issued its first opinion in this matter on November 14, 1972, *Environmental Defense Fund v. Armstrong,* 352 F.Supp. 50 (N.D.Cal. 1972). Viewing the project to be discussed in the EIS as including both the construction and the actual operation of the dam, as urged by the Petitioners, the Court found that the EIS was fully adequate in its treatment of the construction phase of the project and that it was also adequate in its treatment of the operation of the dam, except for the discussion therein of the uses to which the 250,000 to 285,000 acre feet of conservation yield would be put. As to the failure to discuss the uses to which the conservation yield would be put, the Court recognized the difficulty of predicting relative needs ten years into the future (the earliest possible date by which the dam could be filled) but nonetheless ordered the federal defendants to supplement the EIS with a tentative discussion or "best estimate" of the areas of need and of the environmental impacts which would arise from delivery of water to those areas. The court-ordered supplementation was

to proceed in accordance with a schedule proposed by the Court which would permit the letting of the main dam contract and mobilization by the successful low bidder, but which would permit no work to be undertaken at the construction site until after final approval of the revised EIS by the District Court.

On November 28, 1972, the first of two scheduled hearings on the revised EIS was held. At that hearing, the District Court, having studied the draft EIS submitted to it on November 22, 1972, afforded counsel for the Environmental Defense Fund and the Sierra Club an opportunity to comment upon the revised statement, to note any deficiencies therein, and to present to the Court any reasons why the Court should alter either the construction or the supplementation schedules. No such reasons were given at that time by either the EDF or the Sierra Club, but each promised that following careful review of the supplemental data their comments and suggestions would be forthcoming. Following the November 28th hearing, the District Court issued its first Supplemental Memorandum Opinion and Order, in which the court explained that, having been presented with no reason to alter the schedule as initially announced, the parties were to adhere to that schedule.

On November 28th the Court of Appeals for the Ninth Circuit issued a temporary injunction enjoining the federal defendants from certain action concerning the contract for construction of the dam until December 8, 1972. After several continuations, an order was issued on January 18, 1973, continuing the

injunctive relief pending disposition of the Petitioners' appeal. Briefing was scheduled to conform to the District Court's supplementation schedule so as to have a final judgment on the adequacy of the EIS from the District Court prior to the commencement of deliberations.

Accordingly, on January 24, 1973, the final revised EIS was to be submitted to the Council on Environmental Quality (CEQ), thereby allowing at least thirty (30) days for public and agency comment on the statement prior to the taking of any action, as required under Section 10 of the then applicable CEQ Guidelines, 36 F.R. 7724. On February 28, 1973, the hearing on the final revised EIS was to be held, after which the District Court would determine whether the EIS, as supplemented, fully complied with the requirements set down in the NEPA. At the February 28th hearing, however, some confusion arose as to the exact date on which the draft supplemental data was first submitted to CEQ. The hearing was therefore postponed until March 9, 1973, in order that the federal defendants could determine precisely when the statement was filed and consequently how long it had rested with the CEQ.

At the continued hearing on March 9, 1973, it was revealed that the draft revised EIS had been supplied to the CEQ on November 28, 1972, and that the requirements of the CEQ Guidelines had thereby been satisfied. Further, counsel for both the EDF and the Sierra Club waived any objections which they may have had to any failure to comply with the filing re-

quirements of the CEQ Guidelines. Thus, the District Court proceeded with the continued hearing on the merits as to the adequacy of the revised EIS for the New Melones Project.

At the hearing, Petitioners offered three reasons why the court should find that the federal defendants had not fully complied with the NEPA. These were, first, that as amended the EIS was still deficient in that it did not deal with any of the deficiencies alleged to exist in the original May, 1972, EIS, but, rather, dealt exclusively with the use of the conservation yield of the New Melones Dam. Second, that the supplemental EIS was itself inadequate because (a) it did not assign priorities of need for water among the service areas that it suggested may potentially use New Melones water, (b) it omitted all facts regarding the current water supply situation in the Central Valley Project (CVP)[1] and the need for additional irrigation in California, and (c) it failed to discuss possible alternate sources of supply within the CVP. Finally,

[1]The Federal Bureau of Reclamation's Central Valley Project is a comprehensive plan designed to solve water problems unique to this state's central region. It was conceived as, and remains, a gigantic undertaking aimed at redistributing the principal fresh water resources of the state. The plan is based on the capture and storage of the waters of the Sacramento and San Joaquin Rivers and many of their tributaries, and the transportation of those waters to different areas through an elaborate system of reservoirs, canals, and pumps. The Central Valley Project has improved navigation, provided flood control, furnished water for municipal, agricultural, and industrial use, enhanced fish and wildlife values, helped repel salinity in the Sacramento-San Joaquin Delta, and provided recreational opportunities for millions of persons. (See Harold E. Rogers and Alan H. Nichols, *Water For California*, Vol. I, pages 42 and 43). The CVP is also described in the opinion of the United States Supreme Court in *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275 at 279-284.

Petitioners contended that the project should be preliminarily enjoined until the State Water Resources Control Board reached a decision on the applications for water rights permits for the project. After careful consideration of the matter Judge Renfrew found these contentions to be without merit and held in his Opinion and Order of March 16, 1973, *EDF v. Armstrong* (1973) 356 F.Supp. 131, that the original EIS as supplemented was now in complete compliance with the NEPA.

On July 9, 1973, Petitioners' appeals were argued orally in the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the judgments of the District Court on November 9, 1973, and vacated the stay which it had previously granted on January 18, 1973. The full opinion of the Court is contained in *EDF v. Armstrong* (1973) 487 F.2d 814.

ARGUMENT

I. THE DISCUSSION OF CVP WATER SUPPLY WHICH IS CONTAINED IN THE EIS FOR THE NEW MELONES PROJECT IS ADEQUATE.

Petitioners assert that the EIS is deficient in that it fails to expound at great length on the factual statement contained therein to the effect that "there is not enough water available and new water sources are needed." They assert, in essence, that an EIS must not only discuss the environmental ramifications of the project, but must justify the need for the project as well. Were this a new project, Respondent-

Intervenors might be inclined to agree with this analysis, but this is not a new project. NEPA is here being applied retroactively to an on-going project already authorized by the Congress, and the Respondent-Intervenors respectfully submit that Congress would not have given authorization to a project for which it saw no need.

Moreover, the fault which Petitioners purport to find with the EIS is not really the lack of detailed information, but the ultimate conclusion which has been reached by the federal defendants—i.e., that the CVP bucket is not full. A quick reference to the proceedings in the District Court will confirm this fact.

Petitioners urged the District Court to find that the EIS affirmatively misrepresents the need for water in the CVP, and to require that their viewpoint with respect to whether or not additional water is needed within that system be given equal billing with that of those persons charged with state and federal water planning and management. This position was supported partly with unfounded assertions regarding the amount of uncommitted water available in California and partly with reference to several studies predicting economic ruin for California agriculture if new irrigated acreage is developed. At page 138 of its second opinion (356 F.Supp. 131), the District Court rejected all such contentions for the following reasons:

> "As a second reason for finding the supplemental EIS itself to be inadequate, plaintiffs allege that

it does not contain any information about the current availability of water in the Central Valley Project or the need for additional irrigation in California. This omission is affirmatively misleading, it is claimed, because it leads the decisionmakers to believe that there is now a critical shortage of supply in the Central Valley Project and a need for more irrigation in California, when, in fact, there is substantial controversy as to both these needs.

"Initially, it must be recognized that plaintiffs are not claiming that the EIS does not contain information as to current supply and irrigation needs, but, rather, they are disputing the sense of the information which is contained therein. Accordingly, the Court determines that the deficiencies alleged go not to the adequacy or inadequacy of the EIS as revised, but to the merits of the project itself. The latter are something upon which Congress and not the Courts must pass, and plaintiffs' objections must therefore fail. Under NEPA the courts' inquiry must be directed toward ascertaining whether or not certain information is included rather than to a determination of the truth or accuracy of the impression created thereby, absent an allegation that the agency had acted arbitrarily or capriciously in its presentation of information. 5 U.S.C. §706(2)(A).

"Even if the Court were to assume that plaintiffs were alleging that the Corps and the Bureau had so acted in their preparation of the supplemental EIS, thus requiring the Court to go to the merits somewhat, plaintiffs would fail. Their claims are based upon a chart entitled 'Central

Valley Project—Sacramento River Basin and Delta Water Supply—1972 Contract Quantities—Present and Projected Uses,' attached as Exhibit Four to their memorandum of February 26, 1973. On the basis of that chart, it is claimed by plaintiffs that there is a greater supply of water than is presently under contract. Their claims must fail for two reasons. First, the chart deals with water under contract only and does not include present and future requests for water, which are in fact quite substantial. Second, aside from these additional requests for water, other important water demands were not accounted for on the chart. Aside from the contracted for water and assuming, no matter how unrealistically, that the state itself does not increase its present level of water diversion, no account has been made for the increased demands on the various projects for purposes of water quality control under Decision 1379 and Decision 1400 which the State Water Resources Control Board might see fit to impose upon the permits granted the projects. Also to be considered are the very substantial water demands for fish and wildlife preservation being urged at the water rights hearings by the State Department of Fish and Game.

"Accordingly, the Court finds a demonstrated need for the New Melones water, at least substantially enough to rebut any possible charge that defendants have acted arbitrarily or capriciously in stating that 'There is not enough water available and new water sources are needed.' EIS at B-19. Accordingly, plaintiffs' second alleged deficiency in the supplemental EIS must fail." (Footnotes omitted)

At both the District Court and the appellate level, as evidenced by the preceding quoted material, Petitioners objected to the truth of the statements in the EIS concerning CVP water supply. Now, after both the District Court and the Ninth Circuit have found against them on these contentions, Petitioners are attempting to argue that the lower courts should have found the EIS to be inadequate for not justifying the need for additional water supplies within the CVP.

The real problem arises here in deciding the basic issue of fact—i.e., is there a need for additional water within the CVP. Based upon the testimony and affidavits before him prior to March 9, 1973, and based upon the unrebutted testimony of Anthony Kasjaka, a supervisory hydraulic engineer with the Bureau of Reclamation who was called on March 9, 1973, to testify to this exact point, the District Court decided the preliminary factual question regarding CVP supply against the petitioners. The Ninth Circuit has affirmed that finding. A mere dispute over a factual finding should not be treated as grounds for granting a Writ of Certiorari where no real questions of law are involved. Petitioners have gone to great lengths to convince the Court that novel questions of law are involved in their contentions with respect to CVP water supply, but the only real question is factual—Does the CVP have enough water to meet existing and projected future water needs within California? Defendant-Intervenors respectfully submit that notwithstanding petitioners' difference of opinion with the federal respondents, it would be improvident

to burden this Court with the task of resolving this factual dispute for still a third time.

II. THE STANDARD OF REVIEW APPLIED IN THE LOWER COURTS WAS PROPER AND IN ANY EVENT HAS NOT RESULTED IN REVERSIBLE ERROR.

Petitioners have conceded at page 22 of their petition that "the touchstone for judicial review of administrative action, *as both lower courts recognized,* is 5 U.S.C. §706(2)." (emphasis added) Thus, it is not the legal tools applied by the lower courts which petitioners question here, but the vigor with which they were applied. Once again, petitioners have failed to state a complaint which entitles them to have this case reviewed by a writ of certiorari. Their objections here, like those with respect to CVP water supply, do not relate to questions of law, but rather to a question of fact—whether the lower courts reached the proper conclusion in determining the EIS to be adequate.

Petitioners have seized upon the reference in the trial court opinion (356 F.Supp. 131, 138) relating to the arbitrary and capricious standard in an effort to muddy the record as to the standard of review which was applied by Judge Renfrew of the District Court. Four extensive days of hearings including evenings and a Saturday session were held on the adequacy of the EIS here in question. The requirements of NEPA and the adequacy of the EIS as measured against those requirements were thoroughly explored by the court during the course of those hearings.

The excerpt previously quoted from the second written opinion of the District Court reveals both the reason for the application of the arbitrary and capricious standard, and the fact that the court was applying that standard to only one of petitioners' claims, to-wit, the claim that the EIS affirmatively misrepresented the need for additional irrigation water in the CVP. A close reading of the court's opinion of March 16, 1973, reveals that the court did not commit error. Judge Renfrew's discussion was couched in the alternative. He ruled on the one hand that petitioners' claims did not go to the adequacy but to the very truth of the NEPA statement. Then, giving petitioners the benefit of the doubt by assuming for the sake of argument that they had raised the issue of arbitrary and capricious agency action even though it was clear from the record they had not, he went on to conclude, based upon the previously alluded to unrebutted testimony of Anthony J. Kasjaka, that even if they had raised that issue they could not prevail because the facts had been accurately set forth in the EIS. If anything, the inclusion of this discussion in the court's opinion represents an abundance of insight into petitioners' claims and a deep concern that they be granted a fair hearing. The application of the arbitrary and capricious standard was not limiting in effect, but expanding and was not reversible error.

III. THE DECISION (NO. 1422) OF THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD WAS NOT A DEVELOPMENT REQUIRING THE FILING OF A SUPPLEMENTAL EIS.

Decision 1422 held that the United States Bureau of Reclamation had not demonstrated a specific plan for applying all of the New Melones project water to an immediate beneficial use. The board reserved jurisdiction over the matter authorizing the Bureau to re-open the question at such future time as it could demonstrate the existence of a definite plan of application. In announcing its decision, the board renounced jurisdiction over construction of dams and over flood control in general, granted permits for fish and recreation and water quality flows, and admitted that "the record contains substantial evidence that the full conservation yield of the New Melones Project, and more, will eventually be needed in Tuolumne, Calaveras, San Joaquin and Stanislaus Counties" (page 16).

This decision is in no way inconsistent with the Bureau of Reclamation position before the District Court, and is affirmatively consistent with the decision of the District Court. Judge Renfrew recognized the ultimate need for the conservation yield of New Melones Dam and the present inability of the USBR to determine with accuracy where that water will be applied in 1980. The State Water Resources Control Board also recognized the ultimate need and the inability of the Bureau to come up with specific plans at this time. Both the District Court and the board have reached a solution which allows operation

of the project to meet present needs for water quality, fish and wildlife, and flood control benefits, while retaining jurisdiction in order to allow the Bureau to amplify its plans with respect to the conservation yield, as those plans develop. The appellate court has given its approval to this approach.

Although Decision 1422 may seem inconsistent with the findings of the lower courts concerning the adequacy of the EIS, that inconsistency can be explained by the differing standards of review applied. The State Board reached a policy position that project benefits did not outweigh detriments and the project should, therefore, not proceed as planned. The courts, on the other hand, looked only to the adequacy of the EIS, leaving the question of proceeding with the project to the appropriate decision making body, i.e., the Congress.

The questions relating to whether the project can or should proceed as planned in view of Decision 1422 will be determined in Congress and/or in litigation presently pending in the District Court for the Eastern District of California (See p. 25 Petition for Writ of Certiorari). The question facing the lower courts and this court in this proceeding is whether the adequacy of the EIS as a decision making tool for the Congress depends upon inclusion therein of discussion relating to Decision 1422.

Decision 1422 has no environmental ramifications which have not already received adequate discussion in the EIS. Its principal impacts are on project fea-

sibility rather than on environmental effects. As in the case of *EDF v. Corps of Engineers,* 342 F.Supp. 1211, 1217-1218, "there is nothing to prevent either the agency involved or the parties opposing proposed agency action from bringing new or additional information, opinions, and arguments to the attention of the upstream decision makers even after the final EIS has been forwarded to CEQ". The record below clearly establishes that the Council on Environmental Quality is aware of Decision 1422. Assuredly the Congressional decision makers are also aware of it, and can consider its ramifications without the necessity of preparing a supplemental EIS to discuss it.

As was noted by the appellate court at pages 821 and 822 of its opinion *(EDF v. Armstrong,* 487 F.2d 814) the NEPA has now served its purpose:

> "The District Court has twice examined the adequacy of the EIS assuming optimum operating conditions as projected by the authorizing agency and has held that it is adequate as revised and supplemented. We have examined those proceedings carefully and agree with the District Court. The NEPA has served its purpose. It has stimulated a full examination of all objections, adverse consequences, alternatives and, with the decision of the SWRCB, possible operational limitations. It now becomes a question of project justification in the light of all known and possible consequences. Future changes which may have a significant effect upon the environment, not heretofore examined, may be brought to the attention of the District Court under its reserved jurisdiction." (footnotes omitted).

If the NEPA is construed, as urged by Petitioners, to require perpetual revision and processing of environmental impact statements, it will result in an endless cycle of planning and studying without actual construction ever getting under way. Respondent-Intervenors do not think such a result was intended by the Congress in enacting the NEPA. Clearly the line must be drawn so that formal planning under the mandates of NEPA may give way to actual implementation. This does not mean that new information should not be made available to the decision makers as it arises, but it does mean that there is a point at which the preparation of decision making tools must give way to the making of decisions with full view of the fact that changed circumstances are always a possibility. The New Melones project has reached that point now. It has already been delayed over a year as a result of these proceedings. Each year of delay means one more year that the residents of the Stanislaus River basin must run the risk of severe flooding. To require supplementation of the EIS to discuss Decision 1422, a document which speaks for itself, can result in no useful purpose. Moreover, the delay which such supplementation and processing would entail could result in the project not being in place and operative at the time of some future major flood.

CONCLUSION

For these reasons Respondent-Intervenors respectfully urge that the Petition for Writ of Certiorari in this proceeding should be denied.

Dated, February 27, 1974.

Respectfully submitted,

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